No. 88-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DeSIMONE and HELEN DeSIMONE,
his wife,

Petitioners,

vs.

RICHARD L. BOVE, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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As petitioners were not afforded the opportunity to orally argue before the panel, which ordered the matter submitted without argument, it is undetermined just why the court of appeals breached its appellate obligation to have applied *Sagala v. Tavares,* 533 A.2d 165 (Pa. Super. 1987).

This Court has consistently held that its *Erie* decision imposes a continuing duty upon federal courts to decide questions of state law in diversity cases. *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 237 (1940). This greater responsibility and duty is not excused because of the difficulty of answering those questions or the character of those answers. *Meredith v. City of Winter Haven,* 320 U.S. 228, at 237 (1943).

The rights of parties to litigation are thus adjudicated ". . . in accordance with the applicable principles for determining state law." *Id.*, at 238. Federal courts have a duty to ". . . ascertain from all available data what the state law is and apply it . . . Where an intermediate state court rests its considered judgment on the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court . . ." *West v. American Telephone & Telegraph Co., supra*, at 237.

Moreover, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, at 543 (1941) mandates that federal courts apply state law based on the latest state court controlling *decision*. *Vandenbark* required the court of appeals to follow the written *decision* in *Sagala* — not just its precedents — because the opinion was issued subsequent to the federal trial court judgment. *Cf. Bradley v. School Board of City of Richmond*, 416 U.S. 696, 713, Fn. 17 (1974).

Huddleston v. Dwyer, 322 U.S. 232 (1944) requires vacation of the court of appeals decision here, for failing to consider *Sagala* — a decision which ". . . has at least raised such doubt as to the applicable [Pennsylvania] law as to require its re-examination in the light of that opinion . . ." *Id.*, at 236, 237.

Sagala altered and changed Pennsylvania law: *Sagala* is the *only* decision which fashions an exclusionary rule concerning evidence in an informed consent case. *Sagala* establishes the standards for admissibility of evidence in such an action, precluding the introduction of any evidence concerning professional standards, because same ". . . incorrectly invites the jury to consider whether the physician acted in conformity with the customary practices of other physicians." *Sagala*, 533 A.2d at 167. ". . . this type of testimony was improperly submitted to the jury."

Ibid. ". . . the introduction of the professional customs testimony usurps the role of the trier of fact and introduced principles that were incompatible with the reasonable patient standard adopted by this Commonwealth." *Id.* at 168. Appendix A shows two of the many examples of improperly admitted defense testimony of Drs. Resnick and Bove.

The tainted evidence thus resulted in producing two fruits of a poisoned tree: an improperly directed verdict regarding the increased risk due to diverticulosis, and the improper approval of the "specialist standard" of disclosure.[1]

Sagala applies existing Pennsylvania law to obtain a different — but consistent — legal result when compared to other Pennsylvania precedent. This, of course, is natural with the principle of *stare decisis,* wherein the common law evolves on a case by case basis. It would be abnormal for *Sagala* to have differed from prior Pennsylvania precedent, since until a ". . . decision should be over-ruled by the Superior Court itself or over-ruled by the Supreme Court, it is still the law of this Commonwealth, regardless of the decisions of any other court in the country, including the Federal courts." *Commonwealth of Pennsylvania v. Ewansik,* 520 A.2d 1189, 1190 (Pa. Super. 1987), relying on *In Re Townsend's Estate,* 36 A.2d 438, 441 (Pa., 1944).

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[1] Respondents misstate the district court record by claiming there is a lack of evidence concerning the increased risk of perforation due to diverticulosis and the alternative of a diagnostic barium enema examination. Petitioners have reproduced part of the statement of facts from their Appellants' Opening Brief in the court of appeals, which contains the appropriate references to the actual evidence in the record which supports their position. See Appendix B.

Since the federal courts here are adjudicating a matter of state law, in diversity, and are effectively only another Pennsylvania court, it would be incongrous indeed to hold the federal courts not bound by a decision which would be binding on any Pennsylvania court. *King v. Order of United Commercial Travelers*, 333 U.S. 153, at 161 (1948).

Sagala thus distinguishes — in practical application — between objective information which experts must supply, and subjective decision making based on that information, which is the sole province of the jury. Sagala requires that certain testimony must be excluded to prevent the risk that a judge — or jury — improperly relies on same. Motions for new trials and legal arguments over jury instructions are inferior substitutes for direct and focused testimony.

The court of appeals had a duty to ascertain the most current Pennsylvania law applicable to the instant case — it did not fulfill that duty. If *Sagala* is deemed to have altered or changed Pennsylvania law, *Vandenbark* required the court of appeals to follow it. If *Sagala* simply clarified Pennsylvania law, *Oklahoma Packing Co. v. Oklahoma Gas Co.*, 309 U.S. 4, 7, 8 (1940) required the court of appeals to apply it. *Huddleston* required the court of appeals to at least consider *Sagala*.

This Court established the duties for federal courts of appeal in diversity cases, and this Court itself has a duty to enforce such obligations by those appellate courts. Granting the Writ thus ensures adherence to the Rule of Law, to which all participants herein are subject.

Respectfully submitted,

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APPENDIX A

APPENDIX A

EXCERPTS FROM PAGES OF APPELLATE RECORD

Page 95a, ll. 1-7 (testimony of Dr. Resnick)

A. I wouldn't say it's not acceptable. It is not the ideal or the gold standard — the state of the art that we practice today.

Q. When you say gold standard, would you explain for the jury what that means?

A. I don't think it's the best procedure available to follow for people who have had a colon cancer.

Page 374a, ll. 2-5; ll. 17-24 (testimony of Dr. Bove)

Q. And it is correct to state, doctor, that in this case did you not order any barium enemas post-operatively?

A. It is not the standard of care to follow-up with cancer patients in 1984.

* * *

According to the societies which I am a member of and in which I am an active participant and in the way in which I teach the students at Jefferson, barium enema is not a useful study to the follow-up on cancer patients.

Q. Since you you *(sic)* do not believe it to be a useful study, there was no reason to and in fact you did not advise Mr. DeSimone of the existence of a barium enema?

A. That's exactly correct.

APPENDIX B

PORTIONS OF THE STATEMENT OF FACTS CONTAINED IN APPELLANTS' OPENING BRIEF FILED WITH THE COURT OF APPEALS

* * *

More than a year later, in October, 1985, DeSimone while suffering from diverticulosis, returned to Dr. Bove for a follow-up appointment (347a). Dr. Bove advised that a colonoscopy, an intrusive internal examination of DeSimone's remaining colon, be performed as part of the follow-up procedure (350a). DeSimone refused. (274a). Without ever informing DeSimone of the less intrusive, alternative procedure of a barium enema (276a-277a, 374a) or that the colonoscopy created an increased risk of perforation of the colon because of DeSimone's diverticulosis (219a, 390a),[2] Bove persuaded DeSimone nonetheless to allow the colonoscopy.

Thus informed, or uninformed, DeSimone consented to the colonoscopy which Dr. Bove performed on November 5, 1985 (277a). During the procedure, Dr. Bove preforated *(sic)* DeSimone's colon at the site of a diverticulum (221a-222a), the very point at which the increased risk of perforation existed.

* * *

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[2] This increased risk would not have existed with a barium enema. (226a-228a). Diverticulosis is an outpocketing of the colon wall (389a). Diverticulitis is a separate disease caused by inflamation (66a, 390a). A diverticulum or diverticula is a weakened spot in the colon which results from diverticulosis (219a).

Plaintiff's theory at trial was that DeSimone should have been informed that a barium enema was a less invasive method of examination. While there was no dispute among the medical witnesses that the barium enema was an alternative method of colon examination (74a-76a, 123a-124a, 226a-228a, 346a), there was controversy whether it was the best method available. (346a, 374a).

Plaintiff's expert Dr. Fox, testified that the barium enema would have given Dr. Bove necessary information without the risk of perforation of the colon (223a-228a). Dr. Fox opined that a barium enema was a viable alternative method of examining the colon, and that diverticulosis increased the risk of perforation with a colonoscopy (219a, 223a-224a, 226a-227a). . . .

Dr. Resnick, defendant's expert, agreed that diverticulosis increases the risk of perforation of the colon during a colonoscopy, an extremely difficult procedure under ideal conditions (43a-44a). The increased risk exists first because of a weakened spot in the colon caused by diverticulum, and second because of the location of DeSimone's diverticulosis in the sigmoid area of the colon, where the perforation here actually occurred. (68a-69a). Dr. Resnick also agreed that explaining and disclosing the increased risk of perforation to a patient suffering from diverticulosis is important. (69a). The lower court, however, precluded the jury from considering whether these risks should have been disclosed by granting a directed verdict, stating that because DeSimone knew generally of the risk of colon perforation, he did not need to know of the

increased or additional risk caused by his condition (315a-316a).

With regard to plaintiff's alternative method theory, the facts were not in dispute that a barium enema is an alternative method of examining the colon, although medical opinions differed regarding which method was the "gold standard". (95a). Defendant Bove and his expert agreed that the barium enema is "not a state of the art examination". (95a, 346a). Resnick admitted, however, that barium enemas were once useful,[3] generally of good quality, and that he would inform a patient of the possibilities of using either a barium enema or a colonoscopy. (74a-76a). Resnick further agreed with Fox that barium enemas can be of great help as a "road map". (79a-80a). Resnick stated, though, that while the barium enema is an alternative method of examining the colon, he believed it was not an "ideal or the gold standard" and that it just was not the best procedure. (94a-95a).

* * *

[3] Dr. Susan Harding, a defense medical witness stated that she preferred to have both studies done as they complement each other. (123a).